INDEX

	Page
Questions Presented	1
Statement of the Case	2
Grounds for Denying the Writ	2
Conclusion	5

TABLE OF CASES

Clifford F. MacEvoy Co. v. United States for the use of Tompkins Co., 322 U. S. 102, 64 S. Ct. 890, 88 L. Ed. 1163 (1944) 2

Continental Casualty Company v. United States ex rel Conroe Creosoting Company, et al, 308 F. 2d 846 (5th Cir. 1962) 3

Fidelity and Deposit Company v. Harris, 360 F. 2d 402 (9th Cir. 1966) 3

Kalman J. Berenyi v. District Director, Immigration and Naturalization Service, 385 U. S. 630, 87 S. Ct. 666, 17 L. Ed. 2d 656 (1967) 4

United States for the use of Gulfport Piping Co. v. Monaco and Son, Inc., 222 F. Supp 175 (D. Md. 1963) 3

United States for the use of Powers Regulator Company v. Hartford Accident and Indemnity Co., 376 F. 2d 811 (1st Cir. 1967) 3

RULE CITED

Revised Rules, Supreme Court of the United States, Rule 19, 1. (b) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 915

GLENS FALLS INSURANCE COMPANY and
DMH ENTERPRISES, INC.,

Petitioners,

versus

THE UNITED STATES OF AMERICA FOR THE
USE OF NEWTON LUMBER AND MFG. CO. and
PERFECTION TRUSS CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Did the Trial Court, and the Court of Appeals, in holding that substance rather than form controls the coverage under the Miller Act decide a Federal question in conflict with a decision of this Court?

2. Did the Court of Appeals render a decision in conflict with the decisions of other Courts of Appeals on the question of a finding of sham, subterfuge or interposition of a straw man?

3. Was the defense of estoppel determined by departure from the accepted and usual course of judicial proceedings?

4. Are findings of fact by the Trial Court, in which the Court of Appeals concurred, based upon obvious and exceptional showing of error?

STATEMENT OF THE CASE

Petitioners have included the judgments of the Trial Court and of the Court of Appeals for the Tenth Circuit in the Appendix to the Petition. Respondents will not duplicate said judgments in an appendix but will refer to the Appendix in the Petition.

For a more complete statement of the case than found in the Petition, respondents refer to the judgment of the Court of Appeals (Appendix B, 29-33). Petitioners do not assert that the evidence in the record does not support such findings of fact.

GROUNDS FOR DENYING THE WRIT

Respondents assume that petitioners primarily rely upon Rule 19, 1. (b), in asking this Court for a review on certiorari. We have based our opposition to the Petition upon this assumption and the argument follows accordingly.

1. Petitioners cite *Clifford F. MacEvoy Co. v. United States for the use of Tompkins Co.*, 322 U. S. 102, 64 S. Ct. 890, 88 L. Ed. 1163 (1944), asserting that the Court of Appeals decided a Federal question in conflict with that case. *MacEvoy* states that the Miller Act (set forth at page 3 of Petition) is highly remedial

and entitled to liberal construction to protect those whose labor and materials go into public projects. At no point did *MacEvoy* hold or imply that a trial court could not pierce through sham or subterfuge to determine the true relationship existing between parties involved in a project covered by the Miller Act.

United States for the use of Gulfport Piping Co. v. Monaco and Son, Inc., 222 F. Supp. 175, (D. Md. 1963) (rev'd on other grounds 336 F. 2d 636) is fully applicable to the instant case. There it was held that in making a determination as to the definition of "subcontractor" substance and not form controls. The Trial Court in its opinion (Appendix A, 25) found that the contract between Hills and Campbell was a sham. This is of the same effect as though a jury made such finding, which was done in *Continental Casualty Company v. United States ex rel Conroe Creosoting Company, et al*, 308 F. 2d 846 (5th Cir. 1962). That Court of Appeals held that there was no error in submitting the issue of sham to a jury.

2. Petitioners further assert that the Court of Appeals decision to which the petition is sought is in conflict with the decisions of other Courts of Appeals. Certainly there cannot be a conflict with *Fidelity and Deposit Company v. Harris*, 360 F. 2d 402 (9th Cir. 1966), for in such case the Court stated that there was no quarrel with decisions involving subterfuge collusion or interposition of straw men to insulate a prime contractor from Miller Act liability.

Neither does any conflict exist with *United States for the use of Powers Regulator Company v. Hartford Accident and Indemnity Co.*, 376 F. 2d 811, (1st Cir. 1967). There the District Court found that two cor-

porations were in fact separate and the Court of Appeals in its opinion stated that such findings were supported by the evidence. In addition, the Court of Appeals recognized the principle that a party may show sham and the fact that a contract can be a device for limiting the liability of one earlier in the chain of contracts.

3. The record in the instant case will disclose that the petitioners, after making motion to amend the answer, did not tender any defense of estoppel, and that the issue of estoppel was not tried by express or implied consent of the parties. For the purpose of this brief, respondents will assume that the issue of estoppel was properly raised. Respondents refer only to the opinion of the Court of Appeals (Appendix B, 36) wherein the Appellate Court, after a careful review of the record, states that such defense was not established by the evidence adduced at the trial.

4. Respondents submit that petitioners are merely seeking to have the Court undertake to review concurrent findings of fact by the Trial Court and the Court of Appeals. This can be done only upon a very obvious and exceptional showing of error, as this Court recently reaffirmed in *Kalman J. Berenyi v. District Director, Immigration and Naturalization Service*, 385 U. S. 630, 87 S. Ct. 666, 17 L. Ed. 2d 656 (1967). The Petition does not assert any such obvious or exceptional showing of error.

CONCLUSION

For the reasons herein stated, the respondents respectfully urge this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

Louis Johnson, *Attorney of Record*

R. E. Anderson

Daniel P. Edwards